No. 84-978

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,

Appellants,

VS.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasury of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of Environmental Protection; and THE STATE OF NEW JERSEY,

Appellees.

Appeal From the Supreme Court of New Jersey

BRIEF OF APPELLANTS

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QUESTION PRESENTED

When Congress established a federal Superfund financed by a tax on oil and chemicals, it expressly preempted States from requiring contributions to funds the "purpose" of which is to pay cleanup costs and damages which "may be compensated" under Superfund. New Jersey requires operators of major oil and chemical facilities to contribute to a Spill Fund the principal purpose of which is the payment of cleanup costs and damages at sites which are eligible for compensation from the federal Superfund. The question thus presented is:

Whether the New Jersey Spill Fund is preempted because its purpose is to pay cleanup costs and damages which are eligible for payment from and thus "may be compensated" under Superfund or whether, as New Jersey contends and its Supreme Court held, federal preemption only precludes disbursements by Spill Fund for such cleanup costs as "are actually paid" by Superfund?*

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*The names of all parties are set forth in the caption of the case. The appendix to the Jurisdictional Statement, pp. 1a-14a, lists all parent companies, subsidiaries (except wholly owned) and affiliates as required by Rule 28.1.

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OPINIONS BELOW

The opinions of the lower courts are:

Supreme Court of New Jersey, 97 N.J. 526, 481 A.2d 271, reprinted in the appendix to the jurisdictional statement (J.S.) at 15a-36a;

Appellate Division of the Superior Court of New Jersey, 190 N.J. Super. 131, J.S. 37a-46a; and

Tax Court of New Jersey, 4 N.J. Tax 294, J.S. 47a-78a.

JURISDICTION

On September 19, 1984, the Supreme Court of New Jersey entered a judgment affirming the New Jersey Superior Court, Appellate Division, which in turn had affirmed the summary judgment of the New Jersey Tax Court entered against appellants. On November 19, 1984, a timely notice of appeal to this Court was filed by appellants in the New Jersey Supreme Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

This Court noted probable jurisdiction on June 17, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, Cl. 2, provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding.

Pertinent parts of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (CERCLA), are set out in full in the appendix to the jurisdictional statement (J.S. 96a-167a). Sections 114(b) and (c) of CERCLA, 42 U.S.C. §§ 9614(b) & (c), provide as follows:

> (b) Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall

> be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.
>
> (c) Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

Relevant parts of the New Jersey Spill Compensation and Control Act, NJS 58:10-23.11 *et seq.* (Spill Fund), are set out in the appendix to the jurisdictional statement (J.S. 83a-95a). Sections 58:10-23.11f, h and z of that statute provide in pertinent part as follows:

> f. Removal of hazardous substances and actions to minimize damage from discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan for removal of oil and hazardous substances established pursuant to section 311(c)(2) of the Federal Water Pollution Act Amendments of 1972 (P.L. 92-500, 33 U.S.C. 1251 et seq.).
>
> h. There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances to be paid by the transferee; . . .

z. If the United States Congress enacts legislation providing compensation for the discharge of petroleum and hazardous products, the commissioner shall determine to what degree that legislation provides the needed protection for our citizens, businesses and environment and shall make the appropriate recommendations to the Legislature for amendments to this act.

STATEMENT OF THE CASE

There has in recent years developed an increasing awareness of and concern with the potential damage to the environment caused by the release of hazardous substances. In 1972, through passage of one part of the Federal Water Pollution Control Act, 33 U.S.C. § 1321 (Clean Water Act), Congress first addressed this problem. That act, however, dealt only with discharges into navigable waters. In 1976, Congress enacted the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (RCRA), to regulate the future handling of hazardous wastes on land. RCRA did not deal with non-waste toxic materials, nor did it provide for the cleanup of existing hazardous waste sites.

Thus, neither the Clean Water Act nor RCRA was designed to be a comprehensive federal response to the hazardous waste problem. Moreover, by the late 1970's a few States had adopted statutes imposing potentially conflicting obligations upon companies operating in interstate commerce.

New Jersey was one of those States. In 1977, its Spill Fund Act was passed. As more fully described below, pp. 22-24, that Act established a State-administered fund supported by a tax levied upon operators of major facilities in New Jersey used to produce or store petroleum or chemical products. The stated purpose of this fund is to finance hazardous waste cleanup and pay related damages. The New Jersey Act explicitly requires the State, in pursuing such cleanup, to act in accordance with the "National Contingency Plan" as established under the Clean Water Act.

A number of bills were introduced in the 96th Congress that recognized that existing federal programs did not comprehensively deal with the cleanup of hazardous substances and that pointed to the dangers posed by the emerging patchwork of variant State statutory approaches to this problem. Ultimately, on December 11, 1980, as one of the last acts of the 96th Congress, CERCLA was enacted as a compromise measure drawing elements from these predecessor bills.

CERCLA established a $1.6 billion "Superfund," 86% of which is financed by a tax on oil and certain chemicals. The principal purpose of Superfund is to pay for hazardous waste cleanup and related damages to natural resources held in trust by the federal or State governments. CERCLA also directed that the National Contingency Plan established under the Clean Water Act be revised to provide procedures and establish priorities for responding to the release of hazardous substances. CERCLA provides that State cleanup expenditures, if undertaken in a manner consistent with the revised National Contingency Plan, are compensable by Superfund.

A key provision of CERCLA—and the one that gives rise to this suit—is Section 114(c). It preempts States from maintaining special funds for the "purpose" of paying compensation for hazardous substance cleanup costs, damages or claims which "may be compensated" under CERCLA.

Proceedings Below

Soon after CERCLA was enacted, appellants filed a complaint in the United States District Court for the District of New Jersey contending that Spill Fund was preempted by Section 114(c). That court dismissed appellants' suit on the basis of the Tax Injunction Act, 28 U.S.C. § 1341. The Third Circuit affirmed, albeit on the additional ground that plaintiffs' claim did not "arise under" federal law. *Exxon Corp.* v. *Hunt*, 683 F.2d 69 (3d Cir. 1982). This Court denied certiorari. 459 U.S. 1104 (1983).

After dismissal in the district court, appellants filed a complaint in the New Jersey Tax Court. On cross motions for summary judgment, that court dismissed the counts of appellants' complaint which alleged that Spill Fund was preempted. Although recognizing that the purpose of Spill Fund is to finance cleanup costs and damages which "may be compensated" under CERCLA in the sense that they are eligible for compensation under the statute, the Tax Court ruled that Section 114(c) only precludes the use of State funds to pay for cleanup and damages which are actually compensated under CERCLA.

The decision of the Tax Court was appealed to the Appellate Division of the Superior Court. On June 22, 1983, that court affirmed the judgment of the Tax Court. Subsequently, on September 19, 1984, the Supreme Court of New Jersey affirmed the judgments of the Tax Court and the Appellate Division. The State Supreme Court concluded that

> "[t]he Spill Fund tax imposed on plaintiffs is not preempted by Section 114(c) of [CERCLA] insofar as Spill Fund is used to compensate hazardous-waste cleanup costs and related claims that are *either not covered or not actually paid* under [CERCLA]. The underlying intent of [CERCLA], as well as the legislative history, mandates a conclusion of *no preemption*." J.S. 36a (emphasis added).

During the pendency of this litigation, appellants have continued to pay taxes under protest into the New Jersey Spill Fund. The total of their payments between CERCLA's enactment and year-end 1984 exceeds $9,000,000.

SUMMARY OF ARGUMENT

When Congress adopted CERCLA as a "comprehensive" federal-State program designed to clean up hazardous waste through a federal Superfund, it expressly preempted State funds not drawn from general revenues whose purpose was to pay claims which may be compensated under Superfund. The

principal purpose of the New Jersey Spill Fund is to pay such claims.

Accordingly, this is an express preemption case. Under the principles recently articulated in *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7 (1983), a court's function in such a case is to analyze the statute as Congress has written it. Consciously ignoring *Aloha*, the New Jersey Supreme Court instead "harmonize[d]" CERCLA and the New Jersey Spill Fund in accordance with its own assessment of State and federal interests and thereby left the State law intact.

The New Jersey Supreme Court first erred in focusing its inquiry on the uses to which the New Jersey Spill Fund had been or might be put rather than the purpose of the exaction, as required by Section 114(c). It then transmuted the phrase "may be compensated," which broadly establishes the scope of preemption under Section 114(c), into the wholly different phrase "are actually paid." In this fashion, it made Section 114(c) a mere reiteration of the prohibition of duplicative compensation contained in Section 114(b) and rendered meaningless the provisos to Section 114(c) regarding permitted uses of general revenues and special-fund financing of response equipment.

Preemption of the New Jersey Spill Fund is not only expressly required, but also it effectively implements the intention of Congress as reflected in CERCLA and in its legislative history. CERCLA was the first "comprehensive" response by Congress to the national problem of cleaning up hazardous waste sites and spills. All of the bills which preceded its enactment contemplated some type of "Superfund" derived from a tax on oil and chemicals. Congress directed the federal government, in close cooperation with the States, to develop procedures and priorities for the expenditures of these Superfund monies. At the same time, it provided for federal-State coordination with respect to expenditures to clean up priority sites.

Section 114(c) protects this statutory scheme. To preserve the figure which it selected as the appropriate tax to impose on

oil and chemicals to create a cleanup fund during the first five years of CERCLA, Congress preempted all special State funds whose purpose was to clean up Superfund-eligible sites; inevitably, like New Jersey's existing fund, such funds would be raised by taxes on the same products which financed Superfund. Moreover, the whole program of federal-State priorities for Superfund expenditures and oversight of cleanup operations at Superfund-eligible sites could have been disrupted by States' pursuit of their own cleanup priorities undertaken through procedures not coordinated with the federal government and financed by their own special funds.

A construction of Section 114(c) as preempting special State funds whose purpose is to finance any cleanup costs and damages that are eligible for CERCLA compensation is therefore essential, even though there may be potential costs which are eligible for compensation under CERCLA but will not actually be compensated. It was precisely because Congress recognized that not every cleanup cost or damage claim could or should be compensated by funds drawn from special taxes on oil and chemicals during the first five years of CERCLA that it imposed the limitations upon States embodied in Section 114(c).

New Jersey's view—that, if CERCLA priorities dictate that no Superfund monies are immediately available for a Superfund-eligible site, the State should be able to clean up the site with its own special fund monies—ignores Congress' imposition of limits on oil and chemical taxes and its prioritization of the manner in which monies drawn from this source should be spent.

The legislative history of the "may be compensated" formulation of preemption leaves no doubt but that Congress intended to preempt all claims which could be "asserted" or were compensable under CERCLA, whether or not they would actually be paid. The dialogue between Senators Bradley and Randolph upon which the lower court relied is consistent with this legislative history; to the extent either Senator indicated that State

funds could be used for cleanup costs not actually paid by CERCLA, they were referring to monies collected before the statute's effective date or from non-preempted funds.

The subsequent 1984 congressional committee report and EPA guidance memorandum upon which the lower court relied do not justify disregard of the structure and language of CERCLA and its legislative history. Comments in congressional committee reports are not valid legislative history as to earlier enactments, and EPA has no delegated authority to enforce or interpret Section 114(c).

ARGUMENT

I. PREEMPTION PRINCIPLES REQUIRE APPLICATION OF SECTION 114(c) IN ACCORDANCE WITH THE STRUCTURE OF CERCLA AND THE PLAIN MEANING OF THE SECTION'S TERMS.

This is an express preemption case, governed by the principles recently articulated in *Aloha Airlines* v. *Director of Taxation*, 464 U.S. 7 (1983). Section 114(c) of CERCLA indisputably preempts State funds if their "purpose" is "to pay compensation for claims for any costs of response [*i.e.*, cleanup] or damages or claims which may be compensated under" CERCLA. As an express preemption case, the obligation of the courts is to read the terms of the statute and apply them in accordance with their "common-sense meaning" used "in the normal sense." *Metropolitan Life Ins. Co.* v. *Massachusetts*, ____ U.S. ____, 105 S. Ct. 2380, 2389 (1985).

The New Jersey Supreme Court approached this case on a wholly different premise. It held that "courts faced with potentially conflicting state and federal statutes must attempt to harmonize them whenever possible." J.S. 23a. It also asserted that "preemption of state law by federal statute is not favored 'in the absence of persuasive reasons . . . that Congress has unmistakenly so ordained.'" *Id.* On this premise, the court disregarded Congress' explicit preemption of State funds whose

"purpose" was to pay claims which are covered by CERCLA when it held that

> "[a]lthough it may be true that many of the purposes to which Superfund moneys are put overlap with the purposes of Spill Fund, this fact alone does not require a conclusion of preemption." J.S. 26a.

On the same premise, the court ignored the structure of CERCLA, transmuted the phrase "may be compensated" into "actually paid," and thereby concluded that Section 114(c) effects "no preemption" of New Jersey's fund.[1]

All but one of the preemption cases referred to by the New Jersey court to justify this approach to construing Section 114(c) dealt with situations where there was no express preemption by a federal statute and where this Court was accordingly itself required to determine whether a State scheme could co-exist with a federal one.[2] Here, of course, Congress'

[1]The lower court conceded that the phrase "may be compensated under [CERCLA] . . . may appear to be clear *language* at first glance." J.S. 24a (emphasis in original). However, it ultimately held that it could "hardly conclude that it conveys a clear and unambiguous *meaning* in light of the purposes and spirit of [CERCLA] as a whole." *Id.*(emphasis in original). Referring to what it termed "Judge Learned Hand's ubiquitous observation of some forty years ago [that] [t]here is no surer way to misread any document then to read it literally" (*id.*), the New Jersey court found that the phrase "may be compensated" was sufficiently ambiguous that room existed to permit the "harmoniz[ation]" of CERCLA and the New Jersey Spill Fund in a fashion which left the latter available to pay any and all cleanup costs, so long as it did not duplicate payments actually made by federal Superfund.

[2]*Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Perez* v. *Campbell*, 402 U.S. 637, 644 (1971); *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960).

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977), the single express preemption case cited by the New Jersey Supreme Court (J.S. 24a), illustrates the strict adherence to statutory language required by this Court in such cases. In *Rath*, the Court addressed an express preemption provision that prohibited state regulation of meat packaging and labeling that differed from federal regulations. Once the Court had determined that California's requirements differed from federal requirements, its job was complete. "This explicit pre-emption provision dictate[d] the result in the controversy." *Id.* at 530-31.

intent is statutorily expressed. Thus, courts must apply the language employed by Congress and assume that the ordinary meaning of that language accurately expresses the legislative purpose. *Shaw* v. *Delta Air Lines*, 463 U.S. 85, 97 (1983); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 105 S. Ct. at 2390.

In *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. at 12, this Court articulated the principle which the court below consciously ignored:[3]

> "[W]hen a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted."

In concluding that the plain language of the federal statute preempted a Hawaii State tax, the Court admonished the Hawaii Supreme Court for "failing to give effect to the plain meaning of the federal act" by ignoring the distinction between express and implied preemption:

> "The Hawaii Supreme Court apparently considered itself obliged by *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and its progeny to examine thoroughly Congress's intentions before declaring Haw. Rev. Stat. § 239-6 pre-empted. *In re Aloha Airlines, Inc.* 65 Haw. 1, 13-16, 647 P.2d 263, 272-273 (1982). *Rice* and its progeny, however, involved the implicit pre-emption of state statutes. Rules developed in these cases apply when a court must decide whether a state law should be preempted even though Congress has not expressly legislated pre-emption. These rules, therefore, have little application

[3]*Aloha* was decided after this case was argued but before it was decided by the New Jersey Supreme Court. Appellants informed that court by letter of the *Aloha* opinion. However, the court's opinion makes no reference to *Aloha*.

when a court confronts a federal statute like § 1513(a) that explicitly preempts state laws." *Id.* at 12 n.5.

See also, Arizona Public Service Co. v. *Snead*, 441 U.S. 141, 149-50 (1979).

In similarly ignoring the well established distinction between express and implied preemption, the New Jersey Supreme Court mistakenly undertook to "harmonize" the federal and State schemes in accordance with its own assessment of their respective interests. Proper application of the *Aloha* principles requires in this case that the scope of the preemption be determined by an analysis of the statute as Congress wrote it. So applied, these principles dictate the conclusion that New Jersey's fund is preempted by Section 114(c).

II. PREEMPTION OF STATE FUNDS WAS AN ESSENTIAL ELEMENT OF THE COMPREHENSIVE FEDERAL-STATE SCHEME EMBODIED IN CERCLA.

A. Superfund Expenditures Are Directed at Cleaning Up Eligible Sites through Coordinated Federal-State Procedures and Priorities.

The Superfund created by CERCLA has two principal purposes: (1) Payment of "response costs," 42 U.S.C. § 9611(a)(1) & (2)—*i.e.*, the costs either of removing hazardous substances or of taking long-term remedial action to ensure that those substances do not damage the public health, welfare or environment, 42 U.S.C. §§ 9601(23), (24), (25)—and (2) the payment of damages to federal or state governments caused by injury to or destruction of natural resources under their trusteeship as a result of the release of hazardous substances, 42 U.S.C. § 9611(a)(3) & (b).[4]

[4]In addition to response costs and natural resource damages, Superfund is also available for paying other claims under very limited circumstances. 42 U.S.C. § 9611(a)(3) permits the payment of any claim authorized by subsection (b). 42 U.S.C. § 9611(b), refers, *inter alia*, to "claims asserted and compensable but unsatisfied under Section 311 of the Clean Water Act, 33 U.S.C. § 1321." 33 U.S.C. §§ 1321(i) describes such claims. Moreover, 42 U.S.C. §§ 9611(a)(4) & (c) permits Superfund payment of miscellaneous "costs" pertaining to specified studies and programs.

In establishing Superfund, Congress ensured that it was directed toward the sites which most urgently needed attention. CERCLA thus required the President, some of whose responsibilities have been delegated to the Environmental Protection Agency (EPA) while others have been assigned to other federal agencies,[5] to revise and republish the National Contingency Plan (NCP) previously established under the Clean Water Act to include a "national hazardous substance response plan." 42 U.S.C. § 9605. EPA must include within that plan, *inter alia*, "criteria for determining priorities among [sites] . . . throughout the United States for the purpose of taking remedial action and, to the extent practicable . . . for the purpose of taking removal action."[6] 42 U.S.C. § 9605(8)(A).

CERCLA requires that these priorities be based upon careful consideration of input from affected States; for this reason each State must "establish and submit for consideration . . . priorities for remedial action among known [sites] . . . in that State based upon the criteria set forth in" the NCP. 42 U.S.C. § 9605(8)(B). Ultimately, CERCLA required the establishment of a list of at least 400 high priority sites, including among the top 100 at least one such site designated by each State. *Id.* The list identifying high priority sites is an annually revised appendix to the NCP and has come to be known as the "National Priorities List" or "NPL."[7] There are currently 540 sites on the NPL, of which 85 are located in New Jersey.[8] Moreover,

[5]Exec. Order No. 12316, 46 Fed. Reg. 42237 (1981).

[6]" 'Remove' or 'removal' means the cleanup or removal of released hazardous substances from the environment. . . ." 42 U.S.C. § 9601(23).

" 'Remedy' or 'remedial action' means those actions . . . taken instead of or in addition to removal actions . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." 42 U.S.C. § 9601(24).

[7]40 C.F.R. Part 300, Appendix B.

[8]48 Fed. Reg. 40658, 40669-40673 (1983); 49 Fed. Reg. 19480, 19482 (1984); 49 Fed. Reg. 37070, 37083-37085 (1984); 50 Fed. Reg. 6320, 6321-6322 (1985).

EPA has proposed to include on the NPL an additional 274 sites, of which 12 are New Jersey sites.[9]

The NCP provides that "removal" actions may be undertaken at any site at Superfund expense. Longer term, more expensive "remedial" actions qualify for Superfund reimbursement only at NPL sites. *See* 40 C.F.R. §§ 300.65, .67, .68.

Just as Section 105 of CERCLA contemplates federal-State cooperation in the prioritization of hazardous waste sites, Section 104 of the Act, 42 U.S.C. § 9604, provides for coordinated federal-State response actions to clean up such sites with Superfund assistance. Section 104(a)(1) authorizes the federal government to act "consistent[ly] with the [NCP] to . . . take [necessary] response measure[s] . . . to protect the public health or welfare or the environment. . . ." However, the United States may not undertake long-term remedial (as opposed to removal) actions, unless the State first enters into a contract or cooperative agreement that it will assure all future maintenance of such actions and certifies the availability of a hazardous waste disposal facility. 42 U.S.C. § 9604(c)(3).[10] States must also assure payment of at least 10% of the cleanup costs. *Id.*[11] In short, State cooperation with the federal government is essential to conduct cleanup pursuant to CERCLA.

Indeed, Section 104 contemplates that in many instances the State itself will conduct cleanup with Superfund monies. Section 104(d)(1) permits the federal government to "enter into a contract or cooperative agreement with such State" to arrange for cleanup and to permit the State "to be reimbursed for the reasonable response costs thereof from [Superfund]" pursuant to Section 111(a)(1), 42 U.S.C. § 9611(a)(1). In this fashion, CERCLA assures that State cleanup activities at Superfund-eligible sites will be conducted in a manner which complies with federal standards, including those set forth in the NCP.

CERCLA thus constitutes a determination by Congress that a comprehensive and coordinated federal-State approach to hazardous substance cleanup was necessary to address this nationwide problem, as opposed to a proliferation of conflicting, piece-meal and duplicative State schemes. As stated by Congressman Biaggi, one of the principal drafters of one of CERCLA's predecessor bills, "the effect is to provide a uniform law to replace the multitude of varying state statutes on liability and compensation. . . ."[12]

This view was also expressed in the House of Representatives' rejection of a substitute bill offered by Congressman Stockman, 126 Cong. Rec. 26769 (1980), *reprinted in* 2 Legis. Hist. at 328, which in lieu of a federal Superfund proposed a system of federal grants for State cleanup. *Id.* 26757-26758, *reprinted in* 2 Legis. Hist. at 295-298. Successfully opposing the Stockman proposal, Congressman La Falce stated:

> ". . . we cannot have this comprehensive approach if we allow each State to work its own will and come up with some patchwork quilt across the entire United States of 50 differing laws, 50 differing laws dealing with the taxation of the oil and chemical companies, 50 differing sets of laws dealing with the disposal practices, 50 different laws deal-

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[9] 48 Fed. Reg. 9311, 9312 (1983); 49 Fed. Reg. 40320, 40326-40341 (1984); 50 Fed. Reg. 14115, 14121-14122 (1985).

EPA estimates that, on the basis of its current criteria, between 1400 and 2200 sites will ultimately be added to the NPL. Staff of Joint Committee on Taxation, 99th Cong., 1st Sess., Background and Issues Relating To . . . Superfund, at 21 (Committee Print 1985).

[10] Indeed, unless emergency circumstances require it, the federal government may not undertake even removal actions at a cost of more than $1 million or which require more than six months unless the State complies with 42 U.S.C. § 9604(c)(3).

[11] When the site in question was owned by the State or one of its political subdivisions, it must pay at least 50% of the remedial costs.

[12] 126 Cong. Rec. 26196 (1980), *reprinted in* 2 Library of Congress, Sen. Comm. on Environment and Public Works, 97th Cong., 2d Sess., A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510 at 902 (Committee Print 1983) (hereinafter "Legis. Hist.").

ing with every single aspect of this problem." *Id.* at 26765, *reprinted in* 2 Legis. Hist. at 317.

See also id. at 26769 (remarks of Rep. Martin), *reprinted in* 2 Legis. Hist. at 325-327.

In sum, CERCLA envisions a coordinated federal-State scheme: expenditures from Superfund for long-term remedies of hazardous waste sites are channeled to sites identified on the NPL established by the federal government in cooperation with the States; all response costs, whether "remedy" or "removal," in order to be compensated by Superfund must be federally approved to insure that they are consistent with the NCP.[13]

B. CERCLA Imposed a Special Tax on Oil and Chemicals which Was Not to Be Increased by Duplicative State Taxes.

Eighty-six percent of Superfund derives from a tax imposed upon oil and designated chemicals. Section 211 of CERCLA amended the Internal Revenue Code of 1954 to add two new "environmental taxes:" 26 U.S.C. § 4611, which imposed a tax of .79 cent per barrel on all crude oil received at United States refineries and on petroleum products entering the United States for consumption, use, or warehousing; and 26 U.S.C.

[13]Congress did not envision that Superfund would relieve those responsible for contributing to hazardous waste sites of liability for their cleanup. Instead, it provided that ultimate liability would fall upon those who were responsible for owning or operating such sites or for generating or transporting the wastes found in them. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a). Superfund will not finance any government response costs unless it is first determined that corrective action will not be taken by responsible parties. 42 U.S.C. § 9604(a)(1). Likewise, claimants against Superfund must first make a demand for payment upon responsible parties, if identifiable, before they can have recourse to Superfund. 42 U.S.C. § 9612(a). Moreover, any claims paid by Superfund give the United States, by subrogation, the right to recover any response costs or damage payments from the party responsible under Section 107. 42 U.S.C. § 9612(c)(1).

§ 4661, which similarly imposed a tax varying in amounts from $4.87 to $.24 per ton on 42 designated chemical feedstocks.[14]

These special levies on petroleum and chemicals were designed to raise $1.38 billion over five years. 42 U.S.C. § 9653. With additional appropriations from general revenues of $44 million a year for five years, 42 U.S.C. § 9631(b)(2), CERCLA created a federal Superfund of $1.6 billion.

The three bills which were reported out of committee prior to the enactment of CERCLA—S. 1480, H.R. 7020, and H.R. 85—all provided for a federal Superfund created from special levies imposed upon oil and chemicals.[15] This was justified, at least in part, on the basis of the ease of collection from a limited group of taxpayers; this group was not, by any means, viewed as the sole contributor to the hazardous waste problem which Superfund addresses.[16] S. Rep. No. 848, 96th Cong. 2d Sess. pp. 19-20 (1980), *reprinted in* 1 Legis. Hist. at 326-27.

[14]Oil is not a hazardous substance eligible for cleanup under CERCLA. 42 U.S.C. § 9601(14), (23), (24). Nonetheless, because oil is sometimes used as a feedstock from which such substances are created, it and designated chemicals were taxed to provide monies for Superfund.

[15]*See* 1 Legis. Hist. at 501-509 (S. 1480); 2 Legis. Hist. at 448-459 (H.R. 7020); *id.* at 742-754 (H.R. 85). S. 1341, the administration's proposal, also contemplated such a fund. 3 Legis. Hist. at 45-48.

[16]S. 1480 originally envisioned a tax imposed upon 260,000 generators of hazardous waste. Even though these parties were responsible, in significant measure, for creation of the hazardous waste problem addressed by the bill, it was ultimately amended to impose only a feedstock tax upon oil and chemicals. *See* p. 40, *infra*.

Proposals in the most recent sessions of Congress to amend CERCLA recognize the narrowness of the tax base of Superfund under existing law and uniformly recommend expanding substantially the group of taxpayers paying into the fund. *See, e.g.*, S. Rep. No. 73, 99th Cong. 1st Sess. 13-14 (1985) (report of Senate Finance Committee accompanying S. 51); S. Rep. No. 631, 98th Cong. 2d Sess. 42 (1984) (report of Senate Committee on Environment and Public Works accompanying S. 2892); H.R. Rep. No. 890, Part 2, 98th Cong. 2d Sess. 22-23 (1984) (report of House Committee on Ways and Means accompanying H.R. 5640); 131 Cong. Rec. E3252 (daily ed. July 11, 1985) (remarks of Rep. Hall after introducing H.R. 2948).

One of the most contentious parts of the debate surrounding the passage of CERCLA concerned the size of Superfund and the relative share which the manufacturers and importers of oil and chemicals should be required to contribute. The bill eventually enacted as CERCLA was a last-minute compromise arranged by Senators Stafford, Randolph and others when it became clear, following the 1980 election, that S. 1480 would not pass Congress. In the interest of crafting a bill acceptable to the majority, the drafters of the Stafford-Randolph compromise reduced the size of the fund reported in S. 1480 to the $1.6 billion eventually adopted. *See* 126 Cong. Rec. 30936, *reprinted in* 1 Legis. Hist. 696 (remarks of Sen. Stafford).[17] In addition, they included Section 114(c) to preempt similar state funds.[18]

In imposing CERCLA's special tax burden upon oil and chemicals, care was taken to ensure that these products would not be made unduly expensive and thus be placed at a competitive disadvantage in the international marketplace or cause domestic consumers to pay sharply higher prices. For example, Title III of the Act requires the submission of a report to Congress regarding experience under CERCLA which must, among other things, address "the impact of the taxes imposed by title II of this Act on the nation's balance of trade with other countries. . . ." 42 U.S.C. § 9651(a)(1)(F). Additionally, this report must consider whether "the tax burden falls on the substances and parties which create the problems addressed by this Act" and the "administrative and reporting burdens on Government and industry." Id. at § (G).

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[17]This reduction resulted from the adoption of an amendment proposed during the floor debate by Senator Helms. 126 Cong. Rec. 30936, 30937 (1980), *reprinted in* 1 Legis. Hist. at 698, 699. The importance of reducing the size of the fund to ensure passage of CERCLA is underlined by the fact that the Helms amendment was the only one that the floor managers allowed to be considered. *Id.* at 30916 (remarks of Sen. Baker) *reprinted in* 1 Legis. Hist. 562; Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. of Envt'l Law 1, 20-22 (1982).

[18]*See* discussion at pages 37-43, *infra*.

Senator Cannon, one of the persons principally responsible for the evolution of Section 114(c), *see* pp. 41-42, *infra*, emphasized that the size of the tax burden imposed upon oil and chemicals by CERCLA was of critical concern to those involved in the final evolution of the statute:

> "I strongly support the goal of making the environment safer from pollution by hazardous substances, but this goal must be carried out carefully in order not to have unintended and potentially disastrous impacts on the commerce of this country. It is for that reason that we drafted and submitted amendments responding to concerns raised in the Commerce Committee hearings."

126 Cong. Rec. 30950 (1980), *reprinted in* 1 Legis. Hist. at 734.

Thus, as finally enacted, CERCLA reflected Congress' judgment that, for at least an initial five-year experimental period, a tax on oil and chemicals should contribute $1.38 billion to a federal Superfund and States should not add to that burden by creating their own duplicate funds, a point which even New Jersey has been forced to acknowledge. *See* New Jersey Motion to Dismiss or Affirm, p. 5: "Congress . . . was concerned that States would levy taxes on the chemical and petroleum industries to finance State programs that merely duplicated federal funds."[19]

C. Section 114(c) Was Designed Both to Protect the Coordinated Federal and State Procedures of CERCLA and to Ensure that Oil and Chemicals Would Not Be Burdened by Duplicative State Taxes.

After establishing CERCLA as a "comprehensive" federal-State venture, Congress in Section 114, 42 U.S.C. § 9614, fixed

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[19]While Section 114(c) preempts the creation of all State hazardous substance funds, it is clear that the avoidance of additional special taxes on oil and chemicals was of major concern to Congress. It was generally assumed, on the basis of past experience and political reality, that contributions to any State funds were highly likely to come from the same oil and chemical producers or importers that were to bear the major financial burden of Superfund. *See, e.g.*, 126 Cong. Rec. 26209 (1980) (remarks of Rep. Cleveland), *reprinted in* 2 Legis. Hist. at 939; H.R. Rep. No. 172, Part I, 96th Cong., 1st Sess. 22 (1979), *reprinted in* 2 Legis. Hist. at 532.

the relationships between the federal and existing or future State schemes. In Section 114(c), as well as in other subsections,[20] it permitted States to operate in areas not covered by the federal statute, but barred them from doing so where they would duplicate or potentially undermine the experimental Superfund.

As noted above, access to the federal Superfund for reimbursment of cleanup costs and natural resource damages can be obtained only through coordinated federal-State procedures. If States were permitted to create their own special funds for the purpose of financing cleanup at Superfund-eligible sites within the State, they could circumvent the coordinated State-federal procedures and priorities of CERCLA—for example, by relying upon their own funds to pursue cleanup through their own unsupervised procedures and refusing to enter into the cooperative agreements with EPA required by Sections 104(c) & (d) as a precondition to governmental action under Section 104. Thus, Congress provided in Section 114(c) that "no person may be required to contribute to any [other] fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under [CERCLA]."

Congress did not prohibit the States from using general revenues, whether via taxes or borrowings, to create such funds for cleanup: "Nothing in this section [114(c)] shall preclude any State from using general revenues for such a fund. . . ." Resort to such revenues would impose no special burden

[20]Recognizing that Section 107 of CERCLA imposed direct liability upon site operators, generators and haulers only with respect to response costs and natural resource damages, *see* p. 16, n. 13, *supra*, Congress provided that States were not preempted from imposing additional liabilities or requirements with respect to the release of hazardous substances. 42 U.S.C. § 9614(a). Conversely, having established standards of financial responsibility for owners of vessels and of sites capable of releasing hazardous substances, 42 U.S.C. § 9608, Congress provided that States could not impose potentially conflicting or more rigorous standards. 42 U.S.C. § 9614(d).

on oil and chemical products in the manner feared by Congress.[21] Moreover, if precluded from drawing monies from special groups of taxpayers and instead forced to divert limited State general revenues to finance their own cleanup efforts, States would have every incentive to participate in CERCLA and to coordinate their actions with the federal government.

Finally in Section 114(c), Congress recognized that a special tax or fee might appropriately be imposed "upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects [a] State." Allowing States to impose special taxes to raise these monies would not destroy State incentives to participate in CERCLA, as would be the case if they were allowed to use special funds for cleanup.

Thus, the preemption expressed in Section 114(c) reflects a particular concern on the part of Congress with respect to special funds. Superfund, the centerpiece of CERCLA, was a novel five-year experiment in federal-State cooperation;[22] State cooperation was deemed essential to the success of that experiment.[23] States' preoccupation with their individual funds, particularly if such funds became numerous, could skew the results of this experiment and impose a duplicative burden upon the same products which Congress taxed to establish Superfund.

[21]In any event, Congress can be presumed to have been reluctant under established principles of federalism to dictate to the States the uses which could be made of general revenues.

[22]The novel character of CERCLA is reflected in its five-year "sunset provision," 42 U.S.C. § 9653, as well as the previously noted sections of the Act requiring the submission to Congress of reports having to do with the new uncharted areas encompassed by CERCLA.

[23]The comprehensive report to be submitted to Congress must address "the record of State participation in the system of response, liability, and compensation established by" CERCLA. 42 U.S.C. § 9651(a)(1)(E).

III. THE PLAIN MEANING OF SECTION 114(c) SHOWS THAT NEW JERSEY SPILL FUND IS PREEMPTED.

A. The Purpose of New Jersey's Spill Fund Is to Pay for Cleanup Costs and Damages which Are Eligible for Compensation under CERCLA.

New Jersey has done the very thing that Section 114(c) forbids. Its Spill Fund is financed by a tax upon petroleum and chemical products, NJS 58:10-23.11h(b), and has as its principal purpose the financing of cleanup costs undertaken by New Jersey at the very sites which are eligible for federal Superfund compensation.

NJS 58:10-23.11h(a) provides that the purpose of the tax imposed by New Jersey is "to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances." Similarly, the first-listed allowable disbursement from the fund, *see id.* at § 23.11o(1), are "costs incurred under section 7 of this act," NJS 58:10-23.11f, and Section 7, in turn, provides for reimbursement to New Jersey's Department of Environmental Protection (DEP) for its cleanup costs. Moreover, Section 7 provides that such cleanup costs shall, "to the greatest extent possible, be in accordance with the National Contingency Plan [NCP]" which is now administered pursuant to Section 105 of CERCLA. Of course, the NCP-consistent expenditures at which Spill Fund was targeted are the very expenses which "may be compensated" under CERCLA. *See* pp. 12-14, *supra*.[24]

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[24]Spill Fund has subsidiary purposes that do not duplicate those of CERCLA. Unlike CERCLA, under Spill Fund, oil and petroleum products are considered "hazardous substances." Thus, under Spill Fund, unlike CERCLA, oil spill cleanup can be compensated. Moreover, while some of the "damages" which may be compensated by Spill Fund, NJS 58:10-23.11o, include the destruction of natural resources held in trust by the State and would be included within the allowable damages charged against Superfund, NJS 58:10-23.11g(a)(1) & (2), other damages covered by Spill Fund would not be compensable under CERCLA. Finally, the New Jersey fund can also be used for certain administrative and research costs. However, the New Jersey Act specifically provides that these research costs cannot exceed the amount of interest which is credited to the fund. NJS 58:10-23.11o(3) & (5).

The record before the Tax Court at the time of its decision disclosed that cleanup of oil spills constituted only 1% of the expenditures from Spill Fund and that the damages and administrative and research costs totalled less than 5%. Doubtless because of their *de minimis* proportions, New Jersey does not contend and the State Supreme Court did not hold that these incidental purposes save Spill Fund from the preemption of Section 114(c).

New Jersey ignores the stated purpose of the tax imposed to create Spill Fund and contends that the statute is to be judged solely by the way in which the State has chosen to make expenditures from the fund. (N.J. Motion to Dismiss, pp. 9 and 15). Under this reasoning, New Jersey can collect a tax designed by its legislature for a preempted purpose so long as the monies are not improperly expended. But Section 114(c) preempts on the basis of the "purpose" of the tax when enacted, not subsequent decisions by administrators as to how monies are spent.

Thus, the dispositive fact here is that when Spill Fund was enacted in 1977, the tax rate which it imposed upon oil and chemicals was fixed to accomplish the Act's broad purpose of cleaning up hazardous waste sites in accordance with the NCP. That rate has never been reduced, even though CERCLA now directs that Superfund monies shall be expended at these sites consistent with the NCP.

The fact is, New Jersey foresaw the possibility that "Congress [might] enact[] legislation providing compensation for the discharge of petroleum and hazardous products" and the legislature directed that, in the event of such federal legislation, there should be both a determination as to "what degree that legislation provides the needed protection for [New Jersey's] citizens, businesses and environment" and "appropriate recommendations to the Legislature for amendments to [Spill Fund]." NJS 58:10-23.11z. However, despite CERCLA's imposition of a $1.38 billion tax upon oil and chemicals and despite its targeting of these monies at the same sites which are the

focus of New Jersey's Spill Fund, no amendments have been made to the New Jersey Act to conform it to CERCLA. Thus, appellants have been forced to continue to pay taxes to New Jersey whose purpose is to finance cleanup costs and damages which are now eligible for compensation under CERCLA.

B. The Plain Meaning of "May Be Compensated" Requires Preemption of New Jersey's Spill Fund.

While it appears to be common ground that the purpose of Spill Fund brings it within the ambit of Section 114(c), appellants and the State disagree as to the meaning of the phrase "may be compensated" as used in that section.

Appellants contend that this term connotes eligibility for, rather than actual payment of, compensation under CERCLA: all State response costs that are consistent with the NCP—"removal" costs, no matter where incurred, and all State "remedial" costs at sites meeting the criteria set forth in the NCP for inclusion on the NPL—are eligible for compensation and thus "may be compensated" under CERCLA within the meaning of the preemptive language of Section 114(c).[25] New Jersey's Spill Fund is invalid under this formulation, because the very purpose of the New Jersey statute is to fund cleanup expenditures consistent with the NCP.

New Jersey argues that Section 114(c) does not bar special tax funding of State cleanup expenditures on Superfund-eligible sites, even those which are incurred at National Priorities List sites, since "inclusion on the NPL does not guarantee that compensation will be provided but merely constitutes the first step for qualifying for Superfund financed remedial action." Motion to Dismiss or Affirm at 20. Thus, New Jersey contends that Section 114(c) only preempts disbursements from State funds for cleanup costs which are actually compensated by federal Superfund. *Id.* According to the State, if CERCLA priorities dictate that there are inadequate Superfund monies presently available to clean up a site, the State can use its own

[25]*See* pp. 12-15, *supra*.

special fund for this purpose. To justify this approach, New Jersey interprets the phrase "may be compensated" as though it reads "are" or "are actually compensated."[26]

It is axiomatic that "the starting point in every case involving construction of the statute is the language itself." *Landreth Timber Co.* v. *Landreth*, ____ U.S. ____, 105 S. Ct. 2297, 2301-02 (1985). *See also Bowsher v. Merck & Co.*, 460 U.S. 824, 830 (1983); *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). Preemption cases, like all others, give this Court "no choice but to 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Metropolitan Life Ins. Co.* v. *Massachusetts*, ____ U.S. ____, 105 S. Ct. at 2389, *citing Park'n Fly Dollar Park* v. *Park and Fly*, ____U.S. ____, 105 S. Ct. 658, 662 (1985).[27] The plain meaning of the term "may be compensated" supports appellants' reading of the statute and is inconsistent with the view advocated by New Jersey.

"May be" plainly connotes the potential for compensation under CERCLA, not its certainty as argued by New Jersey.

[26]The Motion to Dismiss or Affirm (p. 10-11 n.*) implies that no Spill Fund money has been expended on Superfund-eligible sites and expressly states that no Spill Fund money has been spent on sites receiving federal funds. This is simply not so. The official reports filed by the State Auditor in accordance with NJS 52:24-4.2 and lodged by appellants with the Court reveal that in the fiscal years ending June 30, 1981 and June 30, 1982, out of $33,432,300 expended from Spill Fund, $31,453,500—or more than 90%—was spent on 10 sites which are included on the NPL. Auditor's Report, May 13, 1983, Schedule I, p. 11. Indeed, $30,905,600 was spent on two sites which actually received federal monies, albeit in amounts that were far less than those spent by New Jersey on these sites. *Id.* & *id.* at 12, Schedule II. *See* 48 Fed. Reg. 40669 (1983), amended by 49 Fed. Reg. 19482 (1984); 48 Fed. Reg. 37082 (1984).

[27]In *Metropolitan Life*, this Court broadly read the preemption clause of the federal statute there at issue, but ultimately found the challenged State action not to be preempted by virtue of an explicit exception to the preemption clause. Here, New Jersey has never contended that Spill Fund falls within any such exceptions.

See Bennett v. *Panama Canal*, 475 F.2d 1280 (D.C. Cir. 1973); *John Reiner & Co.* v. *United States*, 325 F.2d 438, 441 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964). Thus, eligibility for compensation was the focus of Section 114(c)'s preemption, not actual payment. Had Congress intended that Section 114(c) be interpreted in the manner advocated by New Jersey, it surely would have used the terms "are" or "are actually" to modify the term "compensated."[28]

Second, as we emphasized in Part III.A. above, Congress preempted State funds on the basis of their "purpose" when established by the State legislature, not the spending decisions made by fund administrators. Because Section 114(c) focused on the legislative purpose of State funds, Congress had to describe prospectively and in general terms the type of claims which could not be paid by them. Thus, it preempted funds whose purpose was to pay claims which "may be compensated" under CERCLA, *i.e.*, claims of the type that would be eligible for compensation under the federal Act.

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[28]The lower court found ambiguity in Congress' use of the term "may" by relying on cases like *Kraft* v. *Board of Education*, 247 F. Supp. 21, 24-25 (D.D.C. 1965), *cert. denied*, 386 U.S. 958 (1967) (J.S. 25a), where "shall" has been substituted for "may" in situations involving the delegation of ministerial power to a public official. The *Kraft* line of cases is distinguishable on two separate grounds.

First, the mere substitution of the word "shall" for "may" in Section 114(c) would be awkward; if Congress had intended to achieve the result reached by the lower court, it would have preempted funds whose "purpose" is to pay "any costs of response or damages or claims which [are or are actually] compensated," not "which [shall be] compensated under this chapter."

Second, the substitution of "shall" for "may" is only appropriate in cases where courts decide that the legislature intended to impose a duty, rather than confer discretion upon a public official. *United States* v. *Thoman*, 156 U.S. 353, 359 (1895). Even in such cases, this transformation of statutory language is permissible only "where it is necessary to give effect to the clear policy and intention of the Legislature. . . ." Only then can "such a liberty . . . be taken with the plain words of the statute." *Id.*, *citing Thompson* v. *Carroll's Lessee*, 22 How. 422, 434 (1860).

The "are actually compensated" construction of Section 114(c) imposed by the lower court, by contrast, is not a generic description of the type of claims for which a State may not create a fund. It thus provides no guidance to State legislatures in their imposition of taxes. The "are actually compensated" formulation of preemption is, instead, a direction to fund administrators not to pay particular claims which have already been compensated by Superfund.

Third, it is manifest that Congress intended to preempt some kinds of forced contributions to State funds when it adopted Section 114(c). However, the "are actually compensated" formulation of preemption would *never* result in preemption. State funds whose purpose is to pay costs, damages or claims which "are actually compensated" by Superfund need no support from State taxes or other forms of forced contribution, since there would never be any net disbursements from such funds. For Section 114(c) to have any meaning it must preempt funds whose purpose is to pay costs, damages or claims that "may be," but are not actually compensated by Superfund.

Finally, as we have shown above in part II, respect for the language in which Congress chose to cast the preemption provisions of Section 114(c) is essential to fulfill the policies underlying that section of discouraging States from resorting to specially-raised funds that would allow them to pursue cleanup priorities outside the comprehensive federal-State program of CERCLA and of preventing duplicative taxation. Under New Jersey's view, States could maintain special funds of unlimited sizes through taxation of the same oil and chemicals which finance Superfund and could proceed independently with cleanup, without any federal coordination, at Superfund-eligible sites by using such funds.

C. New Jersey's Construction of Section 114(c) Renders It Meaningless.

New Jersey's construction of Section 114(c) as barring only disbursements from a special fund for cleanup costs which are

actually compensated by Superfund renders the section virtually meaningless. This is so because the preceding section of CERCLA, Section 114(b), 42 U.S.C. § 9614(b), insures that response costs which are actually compensated by Superfund may not also be compensated by State funds. It provides that

> "[a]ny person who receives compensation . . . pursuant to [CERCLA] shall be precluded from recovering compensation for the same removal cost or damages or claims pursuant to any other State or Federal law."

Thus, Section 114(b) performs the very function which New Jersey would find in Section 114(c) by its "are actually compensated" reading of the section. Since every provision of a statute should, if possible, be construed to have meaning, *Bowsher* v. *Merck & Co.* 460 U.S. 824, 833 (1983); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955), New Jersey's reading of Section 114(c) should be rejected.

Second, as previously noted, p. 21, *supra*, a proviso to Section 114(c) makes clear that general revenues may be used for purposes for which special funds may not be used: "Nothing in this section shall preclude any State from using general revenues for such a fund. . . .," *i.e.*, to pay "response costs or damages . . . which may be compensated" under Superfund. If, as New Jersey argues, Section 114(c) only preempts State special funds from paying response costs that are actually compensated by Superfund, this proviso would mean that States are free to create general revenue funds for State response costs which are actually compensated by Superfund. But Section 114(b) precludes such duplicate compensation by both federal and State funds. For the general revenue proviso to have any meaning, the "fund" to which it refers must be one which permits the payment of monies that "may be," but are not actually compensated under Superfund.

Finally, Congress found it necessary in Section 114(c) to make it explicit that

> "Nothing in this section shall preclude any State from . . . imposing a tax or fee upon any person or upon any substance in order to finance the purchase of prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State."

This disclaimer as to the scope of the preemption clause also has no meaning under New Jersey's view of Section 114(c). Unless Congress intended Section 114(c) broadly to preempt taxes or fees upon particular persons or substances to pay State cleanup costs, there was no reason for it to make clear that such special taxes or fees could be used for the State to incur the limited costs described by this proviso to Section 114(c).

In *Connecticut Department of Income Maintenance* v. *Heckler*, ____U.S. ____, 105 S. Ct. 2210, 2213 (1985), this Court refused to construe a statute in a way that would render "unnecessary and illogical" an express exception to its operation. *Cf. Metropolitan Life Ins. Co.* v. *Massachusetts*, 105 S. Ct. at 2390. Here, construing Section 114(c) as only preempting the use of special State funds to pay cleanup costs that are actually compensated by federal Superfund would render "unnecessary and illogical" the explicit provisos in that section authorizing the use of general revenues for cleanup costs and of special funds for limited preparatory expenses.

D. The Solicitor General's Suggestion that Section 114(c) Preempts Only State Funds Established to Pay Third-Party Costs is Without Merit.

In response to this Court's request for a brief *amicus curiae* from the United States prior to the Court's decision to note probable jurisdiction, the Solicitor General asserted an alternative analysis of Section 114(c). That analysis conceded the preemptive purpose of Section 114(c) and did not endorse New Jersey's "actually paid" construction of "may be compensated." However, it would on other grounds validate Spill Fund to the extent it is used to pay New Jersey's, as opposed to third-

parties', response costs and damages, even though they are eligible for compensation by Superfund.

The Solicitor General argues that payment by a State fund of cleanup expenses or damages incurred by the State is not "compensation" for a "claim" within the meaning of Section 114(c). Thus, in his view, States are preempted only from establishing special funds to pay response costs or damages incurred by third parties. This view of the statute is untenable.

First, under CERCLA a "claim" is a "demand in writing for a sum certain." 42 U.S.C. § 9601(4). A "claimant" is "any person who presents a claim for compensation. . . ." 42 U.S.C. § 9601(5). A "State" is specifically defined to be a "person" within the meaning of the Act. 42 U.S.C. § 9601(21). Accordingly, States must file "claims" for "compensation" when they seek Superfund reimbursement. *See* 42 U.S.C. §§ 9611(a)(3) & (b) regarding the assertion of "claims" by States against Superfund for natural resource damages. *See also* 42 U.S.C. § 9612(b)(2)(C): "[N]o payment may be made on a claim asserted on behalf of [a] State or any of its agencies or subdivisions unless the payment has been approved by [EPA]." Therefore, when Congress barred the use of special State funds "to pay compensation for claims for any costs of response or damages," it surely had in mind the types of claims for compensation which States customarily file under Superfund and did not limit that term to the payment of third party claims.

Second, under Section 114(b) "[a]ny person who receives compensation for removal costs or damages or claims pursuant to any other . . . federal or State law shall be precluded from receiving compensation for the same removal costs [etc.]" under CERCLA. Congress surely intended that a State agency, such as New Jersey's DEP, could not receive duplicative "compensation" from both a state fund and Superfund. DEP must, therefore, be a "person who receives compensation" within the meaning of Section 114(b) and similarly must be a recipient of "compensation" within the meaning of Section 114(c).

Third, the stated purpose of the tax levied by New Jersey upon petroleum and chemicals to create Spill Fund "is to ensure compensation for cleanup costs and damages associated with any discharge of hazardous substances. . . ." NJS 58:10-23.11h(a). The "compensation for [such] cleanup costs" is received by DEP. *See id.* at 23.11o(1), 23.11f.

The New Jersey fund is administered by an official appointed by the State Treasurer, NJS 58:10-23.11j. Spill Fund is strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained. NJS 58:10-23.11g. DEP, under certain statutorily defined circumstances, is expressly required to present claims for compensation to the administrator of the New Jersey fund. *See, id.* at 23.11f(c). Although the statute is silent as to the precise procedures used by DEP under other circumstances where it is authorized to draw money directly from the fund, *id.* at 23.11f(a), it seems certain that they involve some sort of "demand in writing for a sum certain"—*i.e.*, a "claim" as defined in CERCLA. In any case, it is inconceivable that Congress intended the preemptive effect of Section 114(c) to turn upon the administrative mechanisms adopted by a State for purposes of paying response costs—*i.e.*, whether the State agency has to file claims or whether it can make direct withdrawals without so filing.

Fourth, like the approach urged by New Jersey, the Solicitor General's construction of the statute makes "unnecessary and illogical" the explicit proviso in Section 114(c) allowing special funds to finance State purchase of response equipment. If Section 114(c) preempts only third-party response costs, there was absolutely no need to authorize the limited State expenditures from the special fund contemplated by this proviso.

Finally, the Solicitor General's approach to the statute would not serve any of the policies which Congress sought to further when it adopted Section 114(c)—*i.e.* to ensure that States would direct their response efforts through the coordinated federal-state mechanisms of CERCLA and to limit the special

tax burden imposed upon oil and chemicals. The Solicitor General's approach would leave the States free to create special funds of unlimited size and allow them to pursue cleanup wholly outside the framework of CERCLA.[29]

E. The Rationale for the New Jersey Supreme Court's Avoidance of the Plain Meaning of the Terms of Section 114(c) Was Mistaken.

1. The New Jersey Court Both Misunderstood and Gave Undue Weight to the Debate Between Senators Randolph and Bradley.

A key element in the lower court's disregard of the explicit terms of Section 114(c) was its reliance upon the exchange between Senators Randolph and Bradley regarding preemption. We show in Part IV.B. below, pp. 43-46, that, properly understood, this exchange recognizes that claims which are eligible for compensation under CERCLA are preempted and thus supports appellants' reading of Section 114(c). In any event, a wealth of other legislative history regarding CERCLA clearly establishes that the operative premise for preemption was eligibility for compensation from Superfund, rather than actual payment.

2. Statements by a Subsequent Congressional Committee Should Not Be Relied Upon to Contradict the Plain Meaning of Section 114(c).

As further support for its decision, the New Jersey Supreme Court referred to a bill introduced but not passed in 1984, four years after CERCLA was enacted. It found in a House committee report relating to the bill (H.R. Rep. No. 890, Part I,

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[29]The Solicitor General has also questioned the premise that the phrase "may be compensated" modifies "response costs or damages." He argues that payments of "response costs" and "damages" are preempted, even if not eligible for CERCLA compensation. While appellants would not be adversely affected by this broad reading of Section 114(c), they do not embrace it. Here, it suffices to show that the avowed purpose of New Jersey's Spill Fund was to raise money to expend on State cleanup and damages at Superfund-eligible sites.

98th Cong., 2d Sess. (1984)) authority for its conclusion that CERCLA preempts State funds only when they are expended for cleanup activities actually compensated by Superfund. J.S. 30a-31a & n.8.

The views of a subsequent Congress at best "form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 119 (1980); *South Carolina* v. *Regan*, ____ U.S. ____, 104 S. Ct. 1107, 1115 n.7 (1984). This is especially true when those views are set forth only in legislative reports, *id.*; *a fortiori*, reports which have not led to the enactment of legislation are a most precarious basis upon which to interpret prior legislation. *Milwaukee* v. *Illinois*, 451 U.S. 304, 332 n.24 (1981).

Moreover, as the report itself reveals, the dispute between appellants and New Jersey as to the scope of CERCLA's preemption was known to its authors. H.R. Rep. No. 890 at 58-59. This further diminishes the report's reliability as a fair and objective guide to an earlier Congress' intentions.

3. EPA'S Guidance Memorandum Does Not Provide a Reliable Basis for Construing Section 114(c).

The New Jersey Supreme Court also relied upon a comment contained in an unpublished EPA memorandum.[30] The "Executive Summary" to this memorandum states that Section 114(c) of Superfund "does not apply to State funds which are used *** *** To compensate damage claims and to remove or remedy releases of hazardous substances eligible to be financed by [Superfund] but for which no federal reimbursement is provided." J.A. 10-11. The lower court erred in giving weight to this interpretation.

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[30]Office of Emergency and Remedial Response, U.S. Environmental Protection Agency, Guidance: Cooperative Agreements and Contracts with States Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510) (March 1982), J.A. 4-11.

While implementation of various provisions of CERCLA has been delegated to EPA, Section 114(c) is not one of them.[31] Thus, in adopting the position of the federal defendants and dismissing the complaint in *New Jersey* v. *United States*, 16 Envtl. Rep. Cas. [BNA] 1846 (D.D.C. 1981), the court stated:

> "It is undenied that the United States has genuinely taken no position on the scope of Section 114(c), and does not even have in place an administrative mechanism for formulating an authoritative position on the section. There has been no delegation of power from the President to any agency to enforce the section, as there has been with other provisions in the Superfund legislation, *see* Exec. Order 12286, 46 Fed. Reg. 9901 (1981), and there is no expectation that such a delegation will occur soon." *Id.* at 1849.

Since EPA has not been delegated the authority to enforce Section 114(c), no particular deference should be accorded to its interpretation. *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 565-67 & n.21 (1979); *Goolsby* v. *Blumenthal*, 581 F.2d 455, 480 (5th Cir. 1978), *cert. denied*, 444 U.S. 970 (1979); *Veterans Admin. Med. Cent.* v. *Federal Labor Rel. Auth.*, 732 F.2d 1128, 1132 n.7 (2d Cir. 1984).[32] Thus, the question presented in this case is one of statutory construction readily susceptible of judical resolution without assistance from an administrative agency. *Bureau of Alcohol, Jobs & Firearms* v. *FLRA*, 464 U.S. 89 (1983); *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 41 n.27 (1977).

There are other factors which further erode the deference which should be accorded the EPA comments. The relative

[31] *See* Exec. Order No. 12316, 46 Fed. Reg. 42237 (1981); Exec. Order No. 12286, 46 Fed. Reg. 9901 (1981).

[32] The decision by both Congress and the President not to delegate authority to EPA regarding the preemption issue undoubtedly stemmed from its lack of expertise with respect to such questions. An agency's lack of expertise constitutes a further ground not to defer to its interpretation of a statute. *FCC* v. *RCA Corp.*, 346 U.S. 86, 91 (1952).

weight to be given to the judgment of an administrative agency in a particular case depends upon "the thoroughness evident in its consideration, the validity of reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

The EPA memorandum is deficient in all these respects. It was issued by a lower official of the EPA. It was not preceded by any notice or comment. On its face, the memorandum shows that it is not based on any analysis of Section 114(c).

The stated purpose of the EPA memorandum is to provide instructions to EPA regional offices on the use of cooperative agreements and contracts with States for planning and implementing remedial or certain cleanup actions under CERCLA. Nowhere in the body of the document is there any mention of preemption of State taxation. That subject is outside the scope of the memorandum.

The "executive summary" assertion as to Section 114(c) is, therefore, wholly gratuitous, and is not supported by any policy, legal or other rationale. Where an agency does not reveal the reasoning that went into its interpretation of a statute, its position should be accorded little deference. *SEC* v. *Sloan*, 436 U.S. 103, 117-18 (1978); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n.5 (1978); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 627 (1971); *Northern Colo. Water Conservancy Dist.* v. *FERC*, 730 F.2d 1509, 1519 (D.C. Cir. 1984).[33]

In addition, the EPA memorandum is contrary to the position which the agency itself has previously taken. In pro-

[33] An additional ground for refusing to credit the interpretation of Section 114(c) set forth in the EPA memorandum is its imprecision in discussing the preemptive effect of that section. The EPA memorandum asserts that State funds are not preempted "where no federal reimbursement is provided," whereas Section 114(c) defines preemption in terms of claims which "may be compensated" under CERCLA. The term "reimbursement" is not defined in CERCLA nor is it used in Section 114(c).

mulgating the NCP, EPA encouraged States only to "undertake response actions *which are not eligible* for federal funding." 40 C.F.R. § 300.24(c) (emphasis added). The guidance memorandum's assertion that States may use their own funds for response costs which are "eligible to be financed by [Superfund]" is thus inconsistent with the NCP itself.

Finally, EPA's position in the guidance memorandum departs from the position asserted on its behalf by the Department of Justice in *New Jersey* v. *United States*. The inconsistent views which have been taken as to the EPA's authority to interpret Section 114(c), as well as the meaning which should be given to it, show that the view expressed in the EPA guidance memorandum is not entitled to any weight in this Court. *Montana* v. *Blackfeet Tribe of Indians*, ____ U.S. ____, 105 S. Ct. 2399, 2404-05 n.7 (1985), *affirming* 729 F.2d 1192, 1202 (9th Cir. 1984); *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. at 565-67 n.20; *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858 n.25 (1975).

IV. THE LEGISLATIVE HISTORY OF CERCLA CONFIRMS APPELLANTS' INTERPRETATION OF SECTION 114(c).

The structure of CERCLA and the plain meaning of the language of Section 114(c) so clearly evidence the intention of Congress to prevent duplicative taxation of oil and chemicals to support State funds whose purposes are covered by Superfund that no recourse to the legislative history of the section is necessary. *Cf. TVA* v. *Hill*, 437 U.S. 153, 184 n.29 (1978). In any event, that legislative history negates both New Jersey's interpretation that preemption is limited to claims "actually paid," as well as the Solicitor General's argument that Section 114(c) does not preempt a special fund to the extent it is used to pay cleanup costs and damages incurred directly by a State.

A. Congress Intended to Preempt Special Funds whose Purpose Was to Pay for All Response Costs and Damages which are Eligible for Compensation under CERCLA, Even if They Are Not "Actually Paid."

CERCLA was a compromise achieved on the basis of four predecessor bills: H.R. 7020, 96th Cong. 2d Sess. (1980) (inactive waste sites); H.R. 85, 96th Cong. 2d Sess. (1980) (spills of oil and hazardous substances into navigable waters); S. 1341, 96th Cong. 1st Sess. (1979) (oil and hazardous waste and inactive sites);[34] S. 1480, 96th Cong. 2d Sess. (1980) (coverage was basically the same as CERCLA as eventually passed). *See* 1 Legis. Hist. at V-VII.

Both H.R. 85 and S. 1341, the administration's proposal, contained preemption provisions.[35] Section 612(a) of S. 1341 provided that:

> "(1) No action may be brought in any court of the United States, or of any State or political subdivision thereof, for damages for an economic loss or cost described in subsection (a) of section 607 of this title, a claim for which may be asserted under this title, and
>
> "(2) No person may be required to contribute to any fund, the purpose of which is to pay compensation for such a loss or cost, nor to establish or maintain evidence of financial responsibility relating to the satisfaction of a claim for such a loss or cost. . . ."[36]

Thus, S. 1341 clearly contemplated the preemption of payment of "claims . . . which may be asserted"—*i.e.*, those which were eligible for compensation—as opposed to those which would be actually paid.

Moreover, under Section 607(a) of S. 1341, States could assert claims against the fund for removal costs associated with oil or hazardous substance spills. *Id.* § 607(a). Thus, S. 1341's preemption provision clearly applied to contributions to a State fund, the purpose of which was to pay for claims by States for removal costs relating to oil or hazardous substance spills.

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[34]S. 1341 was also introduced in the House of Representatives as H.R. 4566 and H.R. 4571, both of the 96th Cong., 1st Sess. (1979). *See*, 3 Legis. Hist. 23.

[35]Neither H.R. 7020 nor S. 1480 as originally reported preempted state funds.

[36]3 Legis. Hist. 57.

H.R. 85's preemption provisions were similar to the one finally adopted as Section 114(c). This bill created two funds, one for cleanup of spills of petroleum and the other for hazardous substances in navigable waters. §§ 521, 522, *reprinted in* 2 Legis. Hist. at 873-77. Mandatory contributions into State funds to finance the removal of both oil and other hazardous substances were preempted by Sections 110 and 302, respectively. These sections of the bill provided that "no person may be required to contribute to any fund, the purpose of which is to compensate for a loss which is a *compensable damage* under title V . . ." of the bill. §§ 110(a)(2), 302(a) (emphasis added), *reprinted in* 2 Legis. Hist. at 1051, 1075.

Title V of H.R. 85, in turn, expressly defined "compensable damages" as including damages which could be "asserted for . . . removal costs . . . [or] injury to, or destruction of, natural resources. . . ."[37] Thus, just like S. 1341, H.R. 85 preempted the payment for all cleanup and natural resource damages which could be "asserted" under the bill, not merely those which would be actually paid.

Moreover, the House Merchant Marine and Fisheries Committee Report on H.R. 85 provides that a

> "State can and is expected to be a claimant under the legislation. . . . Once a State expends money for removal costs, it may claim compensation for that item of damages under the procedures outlined in the bill." H.R. Rep. No. 172, Part 1, 96th Cong., 1st Sess. 23 (1979), *reprinted in* 2 Legis. Hist. at 533.

Since "compensable damages" under H.R. 85 included State claims for removal costs, the legislative history of H.R. 85 refutes the Solicitor General's argument that the New Jersey Fund is not preempted from paying State claims for cleanup costs.

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[37] § 531(a)(1)(A), *reprinted in* 2 Legis. Hist. at 877, id. § 301(a)(1), *reprinted in* 2 Legis. Hist. at 826-27; *see* H.R. Rep. No. 172, Part 2, 96th Cong., 2d Sess. 8 (1980), *reprinted in* 2 Legis. Hist. at 619.

The sponsors of H.R. 85 clearly articulated in debate the broad scope of its preemption provisions. For example, Mr. Biaggi, the bill's sponsor, stated that H.R. 85

> "prohibit[s] a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for an oil spill damage claim as defined in Title V of the bill. Thus, the State cannot impose a fee or a tax on oil if that fee or tax is to go into a fund and the fund is for the purpose of paying oilspill damage claims." 126 Cong. Rec. 26196-26197 (1980), *reprinted in* 2 Legis. Hist. at 903.

In response to a question by Rep. Florio, Rep. Biaggi stated that "the purpose of [§ 110] is to prohibit States from creating duplicate funds to pay damages compensable under H.R. 85." *Id.* at 26196-26197, *reprinted in* 2 Legis. Hist. at 904.[38] Mr. Biaggi clearly intended to eliminate duplicative State funds:

> "A patchwork of oil spill liability and compensation laws on the Federal and State levels can only create excessive bureaucracies and a quilt of paperwork which would stretch beyond the imagination.
>
> "How can the various affected industries and transportation modes be able to cope with 50 or more liability and compensation schemes and funds which I am sure are going to be varied and complex? The burden we are imposing—if we do not preempt State laws in this field—will only create a greater burden on you and I—the paying consumer. I sympathize with those who advocate State's rights, but I have considerably more sympathy for the paying consumer."

125 Cong. Rec. 385 (1979), *reprinted in* 2 Legis. Hist. at 470.

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[38] *Accord id.* at 26209, *reprinted in* 2 Legis. Hist. at 939 (remarks of Rep. Cleveland); *id.* at 26207, *reprinted in* 2 Legis. Hist. at 932 (remarks of Rep. Roberts); *id.* at 26198, *reprinted in* 2 Legis. Hist. at 906 (remarks of Rep. Snyder).

S. 1480, as originally introduced contemplated the collection of fees from at least 260,000 generators of hazardous waste. However, the bill, as reported out of Committee in July 1980, imposed only a tax on basic feedstocks (primary petrochemicals, inorganic raw materials and oil), thereby reducing the number of taxpayers to less than 1,000. *See* S. Rep. 96-848, 96th Cong. 2d Sess. 20 (1980), *reprinted in* 1 Legis. Hist. at 327. The bill at this stage did not contain a preemption clause.

The first proposed amendment to S. 1480 which involved preemption of State funds was introduced in August 1980 by Senator Magnuson. 126 Cong. Rec. 21071 (1980), *reprinted in* 3 Legis. Hist. at 70. Section 15 of his amendment provided that "no person may be required to contribute to any fund by any Federal, State, or other law, the purpose of which is to pay compensation for any loss which *may be compensated* under this title." 3 Legis. Hist. at 107 (emphasis added). Senator Magnuson's version of preemption was the first to use the "may be compensated" formulation.

His proposal was never acted upon. It did, however, prompt a written objection from the head of the New Jersey DEP dated September 11, 1980, to this formulation of preemption of State funds:

> "In any discussion of preemption it is important to point out that the language is critical: some ways of drafting it are much worse than others. *The formula used in Sen. Magnuson's amendment, which is virtually the same as that in the House oil-spill bill, H.R. 85,* prohibits the creation of duplicative funds 'the purpose of which is to pay compensation for any loss which may be compensated under this title.'" *The Environmental Energy Response Act: Hearings on S. 1480, Senate Committee on Finance,* 96th Cong. 2d Sess. 591 (1980) (emphasis added).

Thus, New Jersey recognized that the "may be compensated" formulation of preemption proposed by Senator Magnuson was "virtually the same" as H.R. 85, which, as shown

above, embodied the concept of eligibility for compensation, rather than actual payment. New Jersey made it very clear that it opposed this type of preemption:

> "The effect of this kind of language we have termed 'swiss-cheese preemption,' because it would shoot holes in State laws only to the extent incidents or damages are compensable under the federal law, leaving the rest intact." *Id.*

New Jersey itself therefore understood, contrary to its present arguments and the holding of the lower courts, that the "may be compensated" version of preemption implied general eligibility for compensation—not "actual compensation"—and would preempt aspects of the New Jersey Spill Fund.

On September 24, 1980, Senator Cannon also introduced proposed amendments to S. 1480, one of which provided for the preemption of duplicative State funds. His explanation for this amendment stated:

> "This amendment provides that *claims that may be asserted* under this act (other than claims relating to closed hazardous waste disposal facilities) may not be asserted under other laws and that the states are preempted from establishing funds or imposing financial responsibility requirements for such claims. . . . This amendment is consistent with both S. 1341, the administration's proposal, and H.R. 85, the House companion bill which passed the House on September 19, 1980."[39]

Like all other predecessor versions of preemption, the one proposed by Senator Cannon contemplated the payment of any claims which might be "asserted" under the statute, not merely those which would actually be paid.

CERCLA, as finally enacted, was introduced in the Senate on November 24, 1980, as an amendment to H.R. 7020.[40] The

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[39]126 Cong. Rec. 27086 (1980), *reprinted in* 3 Legis. Hist. at 186 (emphasis added).

[40]*See* 126 Cong. Rec. 30987 (1980), *reprinted in* 1 Legis. Hist. at 771-772.

terms of Section 114(c) of the Act derived from the amendments proposed by Senator Magnuson and Senator Cannon to bring S. 1480 into conformity with the preemption provisions of H.R. 85 and S. 1341.

This is confirmed by the introductory remarks of Rep. Florio when CERCLA was sent to the House for a vote:

> "Regarding the preemption language contained in these amendments, I would point out that some States, including my own State of New Jersey, have successful spill funds and that while *States may not create duplicate funds to pay damages compensable under this bill*, there is no preemption of the State's ability to collect taxes on fees for other costs associated with releases that are not *compensable damages* as defined in this legislation. . . ." (emphasis added).

126 Cong. Rec. 31965 (1980), *reprinted in* 1 Legis. Hist. at 780.

As the above discussion makes clear, there was a consistent understanding by all of the drafters of preemption provisions of the bills which preceded CERCLA that State funds would be preempted from paying cleanup costs or damages which were eligible for compensation by Superfund. From S. 1341's preemption of "claims . . . which may be asserted," through H.R. 85's preemption of "compensable damages" defined as damages which could be "asserted," through the "may be compensated" formulation as first proposed by Senator Magnuson and as ultimately set forth in Section 114(c), the preemption language was carefully chosen to include all claims that could be asserted under CERCLA, whether or not such claims were actually paid.

B. The Exchange between Senators Randolph and Bradley Is Consistent with the Prior Legislative History Regarding the Interpretation of Section 114(c).

The final debate in the Senate on CERCLA took place on November 24, 1980, and included the colloquy between Senators Randolph and Bradley upon which the lower court placed

such heavy reliance. However, contrary to its holding, that debate indicates that Section 114(c) preempts New Jersey's Spill Fund.

The remarks exchanged between the two Senators addressed three separate issues: (1) the effect of Section 114(c) on the ability of a State to collect taxes for a special fund for payment of claims compensable under CERCLA; (2) the issue whether temporary borrowing would be permitted from a State fund established for non-preempted purposes; and (3) the limitations, if any, upon a State's use of monies in its fund collected prior to the effective date of Section 114(c).

In the first segment of their dialogue, the Senators reaffirmed that the effect of Section 114(c) was to prohibit States from requiring contributions to special funds for items which would be eligible for compensation under Superfund. After mentioning the existence of the New Jersey Spill Fund and several other State funds, Senator Bradley inquired:

> "MR. BRADLEY . . .
>
> Am I correct in understanding that it is the purpose of this legislation to prohibit States from requiring any person to contribute to a fund for the purpose of reimbursing claims already provided for in this legislation?
>
> MR. RANDOLPH. Yes, that is the clear intent. The purpose is to prohibit States from creating duplicate funds to pay *damage compensable* under this bill.
>
> MR. BRADLEY. However, there is no such preemption of a State's ability to collect such taxes or fees for other costs associated with releases that are *not compensable damages* as defined in this legislation.
>
> MR. RANDOLPH. The Senator is correct."[41]

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[41] 126 Cong. Rec. 30949 (1980) (emphasis added), *reprinted in* 1 Legis. Hist. at 731.

Thus, consistent with all other legislative history, both Senators recognized that state funds were preempted from imposing special taxes to pay claims which were "compensable" under CERCLA—*i.e.*, ones eligible for compensation—rather than claims which are actually paid.

In the second segment of their dialogue, the Senators attested that State funds designed to cover expenses and economic losses not covered by CERCLA, could temporarily be used to provide immediate, up-front capital for cleanup compensable by Superfund, provided reimbursement was promptly sought thereafter from the federal fund. As Senator Randolph pointed out, such an inquiry raised a question of bookkeeping rather than one of preemption.[42]

Finally, in the third segment of their dialogue, the Senators reaffirmed that Section 114(c) of Superfund was a limitation on a State's taxing power, not its spending of monies collected prior to CERCLA. Both Senators were well aware that several States with existing State funds had accumulated substantial monies in their funds prior to Superfund, and that questions would arise as to how these pre-Superfund monies could be spent in light of Section 114(c).

Senator Bradley noted that New Jersey had an existing fund.[43] At the time of the legislative debates, New Jersey had approximately $25 million accumulated in this Fund. *See* 1 Legis. Hist. at 459, 2 Legis. Hist. at 116-17. Section 114(c) places no limitation on expenditures of monies if accumulated by a State prior to the effective date of Section 114(c) or from taxes that do not violate Section 114(c). Senator Randolph made clear that these prior monies could be expended for a State's 10% share of remedial costs, expenditures for cleanup efforts not actually paid by the federal Fund or expenditures for State completion of cleanup at sites where federal efforts have been terminated:

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[42] *Id.*, *reprinted in* 1 Legis. Hist. at 732.

[43] *Id.*, *reprinted in* 1 Legis. Hist. at 731.

"MR. RANDOLPH. Mr. President, let me state categorically that there is nothing in this bill that affects the uses to which a State may put the existing cleanup fund. This bill is silent on that subject. Thus a State may, after enactment of this bill, continue to spend its existing funds for any purpose that is lawful under the State law.

If, after enactment of this bill, a State continued to pay claims from a State fund, that would not be contrary to any provision of this bill. What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid for under the provisions of this bill. Thus the State cannot receive a fee or a tax on a substance if that fee or tax is to go into a fund and the fund is for the purpose of paying oilspill damage claims.

Putting it simply, this is a prohibition against double taxation for the same purposes. It is not a prohibition on the uses a State may make of its money, nor does it prohibit a State from imposing taxes or fees for other purposes connected with cleanup or restoration activities such as the purchase of pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.

In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation.

MR. BRADLEY. Am I correct in assuming that moneys expended by State funds can be used to provide the required 10 percent State match?

MR. RANDOLPH. That is correct.

MR. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?

MR. RANDOLPH. That is correct."

Id., *reprinted in* 1 Legis. Hist. at 732-33.

Unlike the initial portion of the dialogue, where Senator Bradley focused upon the purpose of State funds, in this portion he focused upon the uses of State funds, which can include monies collected prior to CERCLA or those drawn from general revenues. Even such funds are precluded by Section 114(b) from making the payments described by Senator Bradley—*i.e.*, where the "efforts . . . are in fact paid for by the federal funds." And, of course, it is true that pre-existing funds and monies drawn from general revenues are precluded neither by Section 114(b) nor Section 114(c) from paying for "efforts which are eligible for federal funds but for which there is no reimbursement," in the language of Senator Bradley.

Thus, the most reasonable and the only internally consistent interpretation to be given the above questions raised by Senator Bradley and the answers of Senator Randolph is that they addressed the extent to which Sections 114(b) and 114(c) restricted the expenditure of State funds or monies collected prior to Superfund or from taxes which did not violate Section 114(c).

In sum, the entire legislative history, including the Randolph-Bradley dialogue, leaves no doubt but that Section 114(c) was intended to prohibit the collection of special taxes for a state fund which, like that of New Jersey, has as its purpose the compensation of cleanup costs and damages which "may be compensated" under CERCLA.

CONCLUSION

The decision of the Supreme Court of New Jersey should be reversed and the case remanded for determination of the amounts due appellants by reason of the Spill Fund taxes that were unlawfully imposed on them.

Respectfully submitted,

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August 1, 1985